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No. 99-1788

IN THE

Supreme Court of the United States

PFIZER INC,

Petitioner,

v.

TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE INTERNATIONAL POLICYHOLDERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE INTERNATIONAL POLICYHOLDERS ASSOCIATION

The International Policyholders Association ("IPA") respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of Petitioner Pfizer Inc ("Pfizer"). The consent of Respondent's attorney was requested but refused.

INTEREST OF THE *AMICUS CURIAE*

The IPA is an organization composed of twenty member companies in the pharmaceutical, medical device, petroleum products, gas and electric, building materials, chemical and railroad industries. The IPA represents its members in their

capacities as policyholders, and protects their interests in matters relating to insurer insolvencies in the United States and abroad.

The issues raised by the Petition affect not only Pfizer, but also other corporate policyholders which likewise find the federal courts closed to them when they litigate with state insurance guaranty funds. The IPA has a substantial interest in preventing a state guaranty fund from evading a federal forum as Respondent Texas Property and Casualty Insurance Guaranty Association ("Texas Fund") did here. The brief the IPA requests permission to file places the questions raised by the Petition in the important context in which they arise: the nationwide epidemic of insurer insolvencies, the creation by every state of a guaranty fund like the Texas Fund in order to deal with the rash of insolvencies, and the litigation between corporate policyholders and these funds that inevitably followed.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE INTERNATIONAL POLICYHOLDERS ASSOCIATION IN SUPPORT OF PETITIONER

This brief *amicus curiae* is filed contingent upon the grant of the foregoing motion for leave to file the brief. The interest of the International Policyholders Association ("IPA") in this case is set forth in that motion.[1]

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[1] In accordance with Rule 37.6 of the Rules of this Court, the IPA states that its counsel authored this brief in whole, and that no person or entity, other than the IPA, its members or its counsel, made a monetary contribution to the preparation or submission of the brief.

ARGUMENT

I. THE PETITION POSES AN IMPORTANT QUESTION OF FEDERAL JURISDICTION OVER STATE GUARANTY FUNDS.

The significance of this case can best be understood in the context in which it arises: the rise in insurer insolvencies in the last two decades, the resultant creation of state guaranty funds and the consequent litigation between policyholders and the funds. We provide that context below.

A. The Wave of Insurer Insolvencies

The late 1980s and early 1990s witnessed a dramatic increase in insurer insolvencies in the United States. Many of these insolvents were companies that had insured major commercial risks. STAFF OF THE HOUSE SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE COMM. ON ENERGY AND COMMERCE, 101ST CONG., FAILED PROMISES: INSURANCE COMPANY INSOLVENCIES 2 (Comm. Print 101-P 1990). When these insurers became insolvent, their affairs were wound up by liquidating their assets and paying claims (including policyholder claims) to the extent the liquidated assets allowed. The effects of these insolvencies continue to be felt by corporate policyholders that now find themselves with significant amounts of coverage issued by insolvent insurers.

The causes of the spate of insolvencies were many, but prominent among them was an escalating number of potential "long-tail" liabilities faced by corporate policyholders and their liability insurers. An explosion in asbestos, other toxic tort and environmental cleanup claims against corporations began in the late 1970s and has yet to abate. Private tort claims and governmental cleanup orders continue to be filed many years after a product's manufacture, sale, use or disposal. *See, e.g., Ortiz v. Fibreboard Corp.*, 119 S. Ct.

2295, 2302 & n.1 (1999) (noting the "elephantine mass of asbestos cases" that have plagued state and federal courts).

An overwhelming majority of courts have held that corporate policyholders can obtain coverage for such claims from policies issued over an extended period of time, beginning in the years during which the product was manufactured, sold or used, or the wastes were deposited, even if the injury or damage was not discovered until many years later. *See, e.g., Armstrong World Indus. v. Aetna Cas. & Sur. Co.*, 52 Cal. Rptr. 2d 690, 715 (Cal. Ct. App. 1996) (adopting a coverage period that commences with the claimant's exposure to a policyholder's product and ends with the date of the claim or death, whichever occurs first). If any of these policies were issued by insurers that subsequently became insolvent, corporate policyholders must look to the estates of insolvent insurers to recoup whatever portion they can of the coverage the insolvent insurers wrote.

Corporate policyholders face a difficult—and often hopeless—task in this regard. State law regulates insurance insolvencies, and a complex and often conflicting array of statutory requirements governs them.[2] State liquidation procedures, while based in part on uniform or model acts, vary significantly from state to state. Additionally, because insurers generally do business in more than one state, the laws of many jurisdictions may be implicated when an insurer becomes insolvent. Thanks to this patchwork quilt of regulation, many corporate policyholders never obtain recoveries for "long-tail" liabilities. And, even if a corporate policyholder properly preserves its claims with the liquidator

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[2] The McCarran-Ferguson Act reserves regulation of insurance to the states. *See* 15 U.S.C. §§ 1011-1015 (1998). Insurers are likewise excluded from the provisions of federal bankruptcy law. *See* 11 U.S.C. §§ 701-706 (1998).

of the insolvent insurer for losses that become known later, "[h]istory has shown that failed insurers may take years to pay all of their liabilities. Policyholders of the failed organizations face potential delays [and] incomplete or disputed claim payments . . . ." Ronald Gift Mullins, *Insurance Industry Still Strong Despite 35 Insolvencies in 1999*, J. COM. 10 (May 15, 2000).

B. The Creation of State Guaranty Funds

The frequent lack of sufficient assets in the estates of insolvent insurers has forced policyholders to pursue recovery from state guaranty associations. States began to form these associations in the late 1960s to provide policyholders with an alternative avenue to recoup their claims against insolvent insurers. By 1983, the guaranty association concept had been universally adopted, with guaranty funds in place in all fifty states, the District of Columbia, the Virgin Islands and Puerto Rico.

Most jurisdictions adopted the Post-Assessment Property and Liability Insurance Guaranty Association Model Act drafted by the National Association of Insurance Commissioners ("NAIC Model Act"). *See* REFERENCE HANDBOOK ON INSURANCE COMPANY INSOLVENCY 717-97 (ABA Tort & Ins. Prac. Sec., 3d ed. 1993) ("ABA Handbook").[3] Under the NAIC Model Act, guaranty funds handle claims much as insurance companies do—they accept or deny claims and litigate coverage issues with policyholders. *See* NAIC MODEL ACT § 8(A)(4) (1996). The statutory purpose of these guaranty funds is to place claimants in the same position they would have been in had the insurer not become insolvent; in effect, each fund "stands

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[3] The ABA Handbook contains a state-by-state summary of guaranty association provisions compared to the NAIC Model Act. *See id.* at 730-97.

in the shoes" of the insolvent insurance company.[4] *See* NAIC MODEL ACT § 8(A)(2).

Recovery is permitted for "covered claims" as defined by each state's statutory scheme. Generally, guaranty associations provide recovery for insureds who are residents of the state at the time of the insured event and for claims arising from property permanently located in the state or from injuries to tort claimants living in the state. *See* NAIC MODEL ACT § 5(F)(1), (2). Thus, major corporate policyholders may seek recovery from a number of guaranty funds for "long-tail" product and environmental claims in a number of jurisdictions other than the one in which the policyholder is located. For example, Petitioner Pfizer Inc ("Pfizer"), a New York insured, has a right to recover from guaranty associations in all states where the underlying tort claimants reside or where property giving rise to the claim is located, including but not limited to Texas.

The NAIC Model Act generally provides for the creation of a nonprofit, unincorporated association to respond to such "covered claims"; the association is comprised of all licensed insurers selling the type of insurance covered by the association. NAIC MODEL ACT § 6. The Texas Property and Casualty Insurance Guaranty Association ("Texas Fund"), for example, has as members those insurers licensed to sell property and casualty insurance in Texas and is financed in part by an assessment on insurance premiums for policies sold by member insurers within the state. *See* TEX. INS. CODE ANN. art. 21.28-C, §§ 6, 8(c) (West 1981 & Supp. 1999); *see also* TEX. PROPERTY & CAS. INS. GUAR. ASS'N PLAN OF OPERATION § 3(a) (App. 19). Insurance companies

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[4] The guaranty association is "deemed the insurer to the extent of its obligation on the covered claims and to that extent shall have all rights, duties and obligations of the insolvent insurer as if the insurer had not become insolvent." NAIC MODEL ACT § 8(A)(2).

covered by a guaranty association are required to be members of the guaranty association of a particular state as a condition of doing business in that state. *See* NAIC MODEL ACT § 6. Consequently, major insurance companies that insure national and international risks and are licensed to do business in all fifty states, the District of Columbia, the Virgin Islands and Puerto Rico must join, and pay assessments to, fifty-three different guaranty associations.

C. Policyholder Litigation with State Guaranty Funds

Policyholder demands on these guaranty funds—resulting in large part from the significant insolvencies of the late 1980s and early 1990s—continue to be pressed and assessments on member insurance companies continue to grow.[5] These increasing financial pressures have led some guaranty funds to dispute their obligations to pay policyholders. *See* Paul Sugarman, *Insolvent Carriers and State Insurance Guaranty Funds*, presented at The Environmental Law Institute, May 17-18, 1990, at 29.

When these disputes arise, corporate policyholders have limited options. A policyholder has recourse only against a guaranty association, and not its members, as there is no statutory provision for several liability. The members likewise have no obligation to pay covered claims—only the association does. *See* NAIC MODEL ACT § 8(A)(1); TEX. INS. CODE ANN. art. 21.28-C, § 8(a).

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[5] From 1969 through 1998, guaranty funds assessed insurers a total of $6.3 billion. In 1998 alone, these funds assessed insurers $264 million to pay for insolvencies, an increase of 13.9 percent over the 1997 amount and more than double the total in 1995, when assessments totaled $95 million. *See* Insurance Information Institute, Inc., *Insolvencies/Guaranty Funds*, INS. ISSUES UPDATE (Ruth Gastel ed., Feb. 2000).

The NAIC Model Act and the Texas statutory scheme further provide that a guaranty association may "sue or be sued," but do not specify a forum for such suit. NAIC MODEL ACT § 8(B)(3); TEX. INS. CODE ANN. art. 21.28-C, § 8(h)(3). For this reason, an out-of-state policyholder often finds itself in a Catch-22 situation. If the policyholder sues a foreign guaranty association in the policyholder's home state, the nonresident guaranty association asserts that the court lacks personal jurisdiction, even though member insurers of the association are citizens of the forum state. *See* TEX. INS. CODE ANN. art. 21.28-C, § 8(b) (the Texas Fund does not stand in the shoes of the insolvent insurer for personal jurisdiction purposes); *see also, e.g., Texas Property & Cas. Ins. Guar. Ass'n v. Boy Scouts of Am.*, 947 S.W.2d 682, 686-87 (Tex. Ct. App. 1997, no writ); *Pennsylvania Life & Health Ins. Guar. Ass'n v. Superior Court*, 27 Cal. Rptr. 2d 507 (Cal. Ct. App. 1994); *Georgia Insurers Insolvency Pool v. Brewer*, 602 So. 2d 1264 (Fla. 1992). Conversely, if the policyholder sues in federal court based on diversity jurisdiction, the guaranty fund (as the Texas Fund did here) argues just the reverse, and claims that it is a citizen of every state where a "member" insurer resides. *See, e.g., Temple Drilling Co. v. Louisiana Ins. Guar. Ass'n*, 946 F.2d 390, 392-93 (5th Cir. 1991); *Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n*, 896 F.2d 674 (2d Cir. 1990). Given the number of insurer members of a fund, the result is that there is virtually no state in which a federal court has diversity jurisdiction over a policyholder's suit against a state guaranty fund.

II. A STATE GUARANTY FUND, LIKE A CORPORATION, SHOULD BE DEEMED A CITIZEN OF THE STATE THAT CREATED IT.

The issue here is whether, for purposes of diversity jurisdiction, the Texas Fund, an unincorporated association created by the Texas legislature, should be deemed a citizen of Texas, or a citizen of every state of which one of its

member insurers is a citizen. The courts below adopted the latter rule on the ground that this Court's decision in *Carden v. Arkoma Associates*, 494 U.S. 185 (1990), compelled it. According to the lower courts, *Carden* adopted a "bright-line" rule: "with the exception of corporations, the citizenship of an entity or association made up of multiple members must be determined by the citizenship of all the members." (App. 4-5.)

But this Court has yet to decide how citizenship should be determined for entities such as state-created guaranty funds, which have a unique quasi-governmental function. Granting the Petition will afford this Court with an appropriate vehicle to do so. *See Carden*, 494 U.S. at 199 (O'Connor, J., dissenting) ("'[A]pplication of statutes to situations not anticipated by the legislature is a pre-eminently judicial function.'" (citation omitted)). For the reasons stated in Pfizer's Petition, guaranty funds should be given the same fictional treatment long accorded to corporations for diversity purposes, and be deemed citizens of the states that created them.[6] Such treatment would prevent forum shopping by a fund and guarantee an out-of-state policyholder an impartial federal forum in the fund's home state.

In Parts II.A-C below, we show that such a result would be consonant with this Court's diversity jurisdiction precedent governing unincorporated associations.

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[6] For over 150 years, a corporation has been considered to be a citizen of the state that created it, regardless of the citizenship of its stockholders. *See Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 461 & n.7 (1980).

A. As in *Navarro*, Member Insurers Are Not Parties in Interest to Policyholder Suits Against Guaranty Associations.

In *Navarro Savings Ass'n v. Lee*, 446 U.S. 458, 464-66 (1980), this Court decided that the trustees of an unincorporated business trust could invoke the diversity jurisdiction of the federal courts on the basis of their own citizenship, without regard to the citizenship of the trust beneficiaries. The Court so held on the ground that the trustees were "real and substantial parties to the controversy," because only they (and not the beneficiaries) possessed "full power to manage and control" the trust, to transact the business of the trust, to initiate and control litigation, and to sue and be sued in the name of the trust. *Id.* at 460-61, 464-65.

Application of the *Navarro* test to a guaranty association like the Texas Fund leads to the same result: the citizenship of member insurers should not be considered for purposes of diversity jurisdiction because they are not "real and substantial" parties to any controversy involving the association's payment of policyholder claims. All a member insurer in a guaranty association can do is to pay assessments levied to meet the outstanding obligations of insolvent insurers.[7] NAIC MODEL ACT §§ 5(H)(2), 8(A)(3); TEX. INS. CODE ANN. art. 21.28-C, § 8(c). As in *Navarro*, it is the guaranty *association*—not any member—that (1) pays the covered claims; (2) stands in the shoes of the insolvent insurer; (3) exercises the insurer's rights, duties and

[7] Contrary to the Texas Fund's assertion in the court of appeals below, a member insurer's assessment obligations are capped at two percent of that insurer's premiums in the prior year. *See* TEX. INS. CODE ANN. art. 21.28-C, § 8(c); NAIC MODEL ACT § 8(A)(3). Given the number of insurers that contribute to each fund, any one member insurer has an insignificant financial interest in suits involving the fund.

obligations as if the insurer had not become insolvent; (4) investigates claims brought against the *association*; (5) settles and pays covered claims to the extent of the *association's* obligations; and (6) can "sue or be sued." NAIC MODEL ACT § 8(A)(1)-(4), (B)(3); TEX. INS. CODE ANN. art. 21.28-C, § 8.

B. As in *Russell*, Guaranty Associations Are Creatures of State Law.

This Court has held that a *sociedad en comandita*, a membership organization created under the Civil Code of Puerto Rico, is a juridical person for diversity purposes. *Puerto Rico v. Russell & Co.*, 288 U.S. 476, 481-82 (1933). Critical to the Court's conclusion there was that the *sociedad* had its roots in a body of civil law that did not give members the right to intervene in lawsuits, or subject them to liability for the *sociedad*'s acts and debts. *See id.* at 481. The Civil Code vested such rights in, and imposed such liabilities on, the *sociedad* alone and not on its members, and only the association had the power to contract, own property, transact business and sue and be sued. *Id.*

The Texas statute, which is based on the NAIC Model Act that forms the basis of the statutory insurance guaranty scheme in almost all states, is strikingly similar to the Civil Code: the Texas law extends the same protections to member insurers and likewise holds the guaranty association responsible for the obligations it is assigned. TEX. INS. CODE ANN. art. 21.28-C, § 8. The analysis in *Russell* thus also supports the conclusion that guaranty funds are distinct from their members for diversity purposes.

C. The Concerns Raised in *Bouligny* Are Not Present Here.

In *United Steelworkers of America v. R. H. Bouligny, Inc.*, 382 U.S. 145, 146-47 (1965), this Court ruled that a labor union was a citizen of every state of which its members were

citizens. That decision flowed from several concerns specific to labor unions that do not apply to guaranty funds. First, the Court was of the view that it could not assume that the union's situation was sufficiently typical to form the basis of a diversity jurisdiction principle. *Id.* at 152. That is not the case with guaranty associations. Forty-nine of the fifty-three statutory schemes providing for guaranty funds are based on the NAIC Model Act. *See* ABA HANDBOOK at 731. More importantly, all but two of the fifty-three state guaranty fund statutes consider guaranty associations to be unincorporated associations for diversity purposes (Florida and Maryland consider such entities to be corporations). *See id.* at 744-97 (summarizing the incorporated or unincorporated status of each guaranty association). A determination that guaranty funds will be considered citizens of their state of creation would therefore have ready and straightforward application.

Second, the Court in *Bouligny* concluded that it could not fashion a test to determine a labor union's citizenship, and noted the complications arising from the local and national structure of labor unions that might have an impact on their treatment for diversity purposes. *Bouligny*, 382 U.S. at 152-53. Guaranty funds present neither difficulty. A rule that a guaranty association, created by a state legislature to protect state residents who are insureds, claimants or owners of property within the state, will be deemed a citizen solely of the state of its creation would have the "certainty of application" found lacking in *Bouligny*. *Id.* at 152.

CONCLUSION

For the foregoing reasons, and those advanced in Pfizer's Petition, the Petition should be granted.

Respectfully submitted,

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